taken by the courts in Sarawak or Malaya, as may be seen from the decisions in the cases of *Sinaraju* v. *Public Prosecutor*,[1] *Yap Seow Keng* v. *Public Prosecutor*,[2] and the Sarawak Case of *Sayang bin Osman* v. *Regina*,[3] which followed the ruling in the *Yap Seow Keng* case.

(6) Further, the evidence of Tinit, even if uncorroborated, was acceptable evidence to support — to corroborate in a different sense — the truth of the retracted confessions.

As to the appellants against whom there was both Tinit's evidence and their own confessions (*albeit* retracted) it is clear their appeal against conviction must fail. As to the others the learned trial magistrate, having duly warned himself was prepared to, and did, convict on the uncorroborated evidence of Tinit alone (in fact the learned trial magistrate, on his own view of the facts, convicted all the appellants on the uncorroborated evidence of Tinit), and this court sees no reason to hold him wrong in so doing. The appeals of all the appellants against conviction are dismissed.

As to Tinit himself he pleaded guilty, and his plea was accepted, quite properly in the circumstances, by the trial magistrate. He attempted to appeal against conviction as well as sentence, but cannot be heard to do so. It may be mentioned that there is also against him his own, unequivocal, and not retracted (except inasmuch as he tried to go back on it in the hearing of this appeal) confession.

As to the sentences imposed this court cannot see that they are in the circumstances inappropriate, (except in the case of Bedinang, who is only 17 years old) or in any way excessive. The appeals against sentences of all the appellants, except Bedinang, are dismissed.

Bedinang claims to be seventeen. This claim was accepted by the learned Deputy Public Prosecutor and by this court. He must be approaching 18 years old, however, and this court cannot see that either he or the Sarawak Boys' Home would benefit by his being sent there. Instead his sentence of 15 months' imprisonment is reduced to one of 6 months.

Appeals dismissed.

M.I. & M. CORPORATION & ANOR. v. A. MOHAMED IBRAHIM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Wee Chong Jin C.J. (Singapore) February 24, 1964]

[Singapore — Federal Court Civil Appeal No. 38 of 1963]

Trade Mark — Infringement and passing off — Trade mark so nearly resembling another as to be likely to deceive — Test to be applied.

Practice and Procedure — Costs — Preparation of record of appeal — Duty of solicitors — Restraint in incurring costs.

In this case the original plaintiff commenced proceedings against the defendants claiming that they had infringed his registered trade mark and had passed off their goods as his. The goods were cooking oil and the registered trade mark was that of a hibiscus flower with red petals and green leaves. The label used by the defendants for their goods was that of a sun flower with green leaves on a yellow background. The plaintiff died before the trial of the action and his personal representatives continued the action. The learned trial judge gave judgment ([1963] M.L.J. 232) against the defendants, who appealed.

Held: (1) the question whether a device used as a trade mark so nearly resembles another as to be likely to deceive or cause confusion is a question of fact;

(2) the test to be applied is whether a person who sees the one trade mark in the absence of the other trade mark and in view only of his general recollection of what the nature of the other trade mark was, would be liable to be deceived and to think that the trade mark is the same as the other of which he has a general recollection. This recollection test is to be applied having regard to the sort of people who would buy the goods and the circumstances in which they buy;

(3) in this case the flower device used by the appellants was likely to deceive or cause confusion and so enable the appellants to pass off their goods as and for the goods of the respondents.

Semble: It is the duty of solicitors to exercise the greatest possible restraint in incurring costs and if this is not done the court will have to consider ways of penalising those who fail in their duty.

Cases referred to:—

(1) *Rysta Ltd's Application* (1943) 60 R.P.C. 87 at p. 105.

(2) *Seixo* v. *Provezenda* (1865) 1 Ch. D. 192.

(3) *Sandow Ltd's Application* (1914) 31 R.P.C. 196 at p. 205.

(4) *Lim Siew Neo* v. *Pang Keah Swee* [1958] M.L.J 111, P.C.

(5) *Amar Singh* v. *Chin Kiow* [1960] M.L.J. 77.

FEDERAL COURT.

L. A. J. Smith for the appellants.

E. W. Barker for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal in a trade mark case against a decision of the High Court in Singapore.

The original plaintiff, who is now dead, and, after his death, his representatives carried on the business of making and selling cooking oil consisting of a mixture of palm oil, mutton fat and coconut oil. This unattractive but no doubt wholesome substance was packed in tins of various sizes each of which bore a yellow label. This label had on it printed matter in red and green which, among other things, set out the plaintiff's name and stigmatised the contents as "Chop Bunga" or "Flower Brand". There was also a picture of a flower of the hibiscus type

with red petals and green leaves enclosed in a red circle. In 1952 this flower picture was registered under the Trade Marks Ordinance, 1938, and the plaintiff's name was entered in Part A of the Register as proprietor of it in respect of "vegetable ghee" for cooking purposes.

Some time in 1959 the defendants started manufacturing and selling a similar sort of cooking oil in tins. These tins also bore a yellow label on which was printed in red and green the name first of the first defendant, and later of the second defendant, and the word "Sunflower". There was also a picture of a flower with red petals and green leaves which although it bears little resemblance to any variety of helianthus hitherto produced by nature is not the same flower as that shown on the plaintiff's labels. Under the picture of this so-called sunflower there were the words "Trade Mark", though it is common ground that the device has not been registered under the Trade Marks Ordinance.

On this the original plaintiff commenced proceedings on 6th August, 1959. He claimed that the defendants had infringed his registered trade mark and had passed off their goods as his and he asked for injunctions and for damages or alternatively an account of profits.

There were very considerable delays with which we are not concerned here but ultimately the case came on for trial before Winslow J. in April, 1963, by which time the plaintiff was dead and for him hibiscus had faded and asphodel had bloomed in its place. In the event the trial judge found there had been both infringement and passing off. He granted injunctions as prayed and made an order for an account of profits made by the defendants from the sale of their oil bearing the sunflower label.

Against that judgment the defendants have now appealed.

I would observe, *in limine*, that on the materials before us there is considerable doubt as to who and what the appellants are. It is clear enough that there must have been in existence two natural persons who were concerned in the manufacture and sale of the cooking oil bearing the sunflower brand and that two natural persons have been content to carry on the present litigation, in which they have been jointly represented. It is not, however, clear whether the natural persons in question have always been the same. No question arising out of this has been raised at any time, however, and we must therefore deal with the matter on the assumption that the appellants who are now before us are the same as the persons whose conduct was complained of by the plaintiff and who were originally sued, or their representatives.

Having made that observation I proceed to consider the evidence. This can be divided into two parts.

First, there were tins of the plaintiff's oil bearing his label and tins of the defendants' oil bearing their label. These labels have been described. It was admitted by both parties that they had sold oil in similar tins bearing similar labels.

Then there was the parol evidence.

It was admitted that for some considerable time, and certainly since before 1952 when his trade mark was registered, the plaintiff had been manufacturing oil and selling it in tins bearing his label.

It was also admitted that the defendants had not commenced manufacturing and selling oil until 1959. They acquired their business in circumstances which are not very clear, but which are not very relevant, from a third party who had been selling oil under the name of "Sunflower Brand".

With the business they acquired this third party's label which bore a picture of a sunflower similar to that later used by them. This label as originally used was not in evidence (it was said there were none still in existence) and there was some confusion of evidence as to its colouring and the truth may well be that this varied from time to time. One witness said that at one time the sunflower had yellow petals with light red on them, the leaves were green and it was printed on a yellow background. At another time the flower was said to be on a black background and at yet another time it was a black flower on a blue background. Another witness thought the sunflower was black and the background was sometimes yellow and sometimes blue. There was, however, no evidence to show that at any time prior to the appellants coming on the scene in 1959 the label was printed with the colours as they appeared after that date, that is to say a red flower with green leaves on a yellow background with red and green printing.

No very clear explanation was put forward regarding the adoption of these colours. The second defendant, having no doubt in mind that a thing of beauty is a joy for ever, said that he wanted his sunflower to look beautiful. He also said, however, that the new colours were suggested by the printer who rather curiously was the same person who printed the plaintiff's labels. On the other hand he had been connected with the edible oil trade in Singapore for some years and he admitted that he had known the plaintiff's label as long ago as 1950 and that he knew that in 1958 the plaintiff had commenced proceedings for infringement of it against his (the defendant's) then employer which had been settled on his employer ceasing to use it.

Then there was a certain amount of evidence from a number of persons who might perhaps be more rightly regarded as compurgators than witnesses who said they had either been deceived or had not been deceived by the resemblance between the two labels. There was also evidence that a flower of some sort was commonly used in Singapore as a trade mark in relation to so-called "vegetable ghee".

On that evidence the trial judge came to the conclusions that there had been both infringement and passing off and the only ground on which these conclusions have been attacked is:—

"The learned trial judge was wrong in law in holding on the facts that the device as used by the appellants was likely to deceive or cause confusion or enable the appellants to pass off goods as and for the goods of the respondent."

The question of whether a device used as a trade mark so nearly resembles another as to be likely to deceive or cause confusion is a question of fact (see *Rysta Ltd's Application* [1]). As was said by Lord Cranworth in *Seixo* v. *Provezenda* [2]: "What degree of resemblance is necessary . . . is from the nature of things incapable of definition *a priori*". Numerous principles have been enunciated as to the way in which the question of fact should be approached, many of which have been cited to us in argument. To embark on any lengthy discussion of these would only be to repeat in possibly less felicitous language much of the learning that is to be found in *Kerly* on Trade Marks.

In the present case the crucial evidence was that of the labels themselves. I am not saying that the other evidence is to be disregarded but that evidence by itself probably did not go further (it certainly went as far) than making out that the defendants intended to produce a label the appearance of which would be close to that of the plaintiff without being so close to it as to expose them to an action like the present. They knew what the plaintiff's label looked like and they knew that he had already commenced proceedings against another party to protect it. They altered the colours of the mark they had acquired with their business to the same colours and the same arrangement of colours as that used by the plaintiff though on the colours commonly used by jobbing printers over a hundred different arrangements of colours would have been available to them. They even went to the same printer as the plaintiff.

On all that there is little if any room for doubt as to what their intentions were. That, however, is not enough; it does not go beyond the permissible limits of commercial chicanery. The real question is whether they went too far and that is to be decided principally on the appearance of the labels themselves and the ways in which the two flowers appeared on them.

We ourselves have seen the two labels on the various sizes of tins to which they were affixed and have had every point of similarity and dissimilarity pointed out by counsel. Looking at them side by side they are clearly different and looking at them side by side nobody could possibly mistake the one for the other. The two flowers differ in many details and though their position on the labels is the same the surrounding wording differs. Even the most careless and ignorant person seeing them side by side on a shelf in a well-lighted grocer's shop could see that they are different. That, however, is not the test to be applied in a case of this sort for if it were it would render nugatory the protection which the law gives to trade and trade marks. For myself I would adopt the test applied by Sargant J. in the case of *Sandow Ltd's Application* [3] which was a registration case. He said:—

"The question is not whether if a person is looking at two Trade Marks side by side there would be a possibility of confusion; the question is whether the person who sees the proposed Trade Mark in the absence of the other Trade Mark, and in view only of his general recollection of what the nature of the other Trade Mark was, would be liable to be deceived and to think that the Trade Mark before him is the same as the other, of which he has a general recollection."

That general recollection test is to be applied having regard to the sort of people who would buy the goods in question and the circumstances in which they buy. In the present case the test is to be applied in relation to people who are generally illiterate and who do their shopping in small dark grocers' shops where large quantities of goods are crowded in a disorderly manner into a very small space. It is to be remembered, too, that a flower of some sort is a common trade mark in connection with this particular commodity. In my view the general recollection on the part of the plaintiff's mark which would affect the minds of such customers in such circumstances would not be a flower (which they would take for granted) or of any particular sort of flower but of the colouring of the flower and its arrangement on the label. I am thus compelled to the conclusion that the flower device as used by the appellants was in fact likely to deceive or cause confusion and so enable the appellants to pass off their goods as and for the goods of the respondents.

Having come to that conclusion and having regard to all the other evidence I would dismiss the appeal with costs.

Before departing from the case I would observe that a great deal of costs have been thrown away in preparing the record of appeal. There is an agreed bundle of documents of 87 pages and 64 pages of this is nothing more than so much waste paper dealing as it does with

matters not even remotely connected with the issues involved in the appeal. Most of it is a long wrangle between the solicitors in connection with some question of security for costs. It is true that the record was prepared by the appellants' solicitor but this particular bundle of documents would appear to have been agreed to by the respondents' solicitors. It is the duty of solicitors to exercise the greatest possible restraint in incurring costs and if this is not done the court will have to consider ways of penalising those who fail in their duty (see *Lim Siew Neo* v. *Pang Keah Swee* [4] and *Amar Singh* v. *Chin Kiew* [5]).

Barakbah C.J. (Malaya) and **Wee Chong Jin C.J. (Singapore)** concurred.

Appeal dismissed.

Solicitors: *L. A. J. Smith*; *Lee & Lee.*

LING BENG SONG & ORS. v. LING BENG SIEW & ORS.

[O.C.J. (McGilligan J.) April 20, 1964]

[Sibu — Civil Suit No. 14 of 1964]

Practice and Procedure — Generally indorsed writ — Necessity to state relief or remedy sought — R.S.C. 1957, O. 2 r. 1, O. 3 r. 1, O. 12 r. 30 & O. 70 r. 1.

The plaintiffs in this case claimed by generally indorsed writ for an order that Sibu Occupation Ticket No. 16872 be sold by public auction or by private treaty or by tender and for other relief which the court may think just and equitable and for costs. The defendants entered conditional appearance and applied to set the writ aside on the grounds that it was "defective and irregular as it discloses no cause of action and does not disclose the title (if any) of the plaintiffs to the subject matter of the writ".

Held: (1) the indorsement on the writ must be sufficiently definite for defendant to know why he is being sued and as there was nothing in the writ in this case to show what sort of action this was, the writ was irregular and did not comply with r. 1 of O. 2 of the R.S.C.;

(2) in the circumstances the service of the writ on the defendants should be set aside.

Cases referred to:—

(1) *Marshall* v. *L.P.T.B.* [1936] 3 All E.R. 83.

(2) *Batting* v. *L.P.T.B.* [1941] 1 All E.R. 228.

(3) *Groundsell* v. *Cuthell* [1952] 2 All E.R. 228.

(4) *Richmond* v. *Branson* [1941] 1 Ch. 968.

(5) *Knowles* v. *Roberts* 38 Ch. D. 270.

(6) *Hill* v. *Luton Corporation* [1951] 1 All E.R. 1028.

(7) *Huntly (Marchioness)* v. *Gaskell* [1905] 2 Ch. 656.

(8) *Truslove* v. *Whitechurch* 133 ER.. 399.

CIVIL SUIT.

George Seah for the plaintiffs.

C. T. Wong for the defendants.

McGilligan J.: This case was, these proceedings were, commenced by a generally indorsed writ of summons dated the 2nd day of April, 1964. The indorsement reads as follows:—

"The plaintiffs' claims are:—

(a) for an Order that Sibu Occupation Ticket No. 16872 be sold by public auction or by private treaty or by tender,

(b) for any other relief which the Court may think just and equitable,

(c) for costs."

The three defendants have entered conditional appearances and have now applied to have the writ set aside on the grounds that it is "defective and irregular as it discloses no cause of action and does not disclose the title (if any) of the plaintiffs to the subject matter of the writ".

The following cases were cited to me: *Marshall* v. *L.P.T.B.*[1], *Batting* v. *L.P.T.B.*[2], *Groundsell* v. *Cuthell* [3], *Richmond* v. *Branson* [4] and *Knowles* v. *Roberts.*[5]

These cases were all of interest and close around the point, as it were; but none were actually on the point, as in none of them were the circumstances exactly the same as here, where the application to set aside was made before a statement of claim has issued, and no amendment of any sort has been asked for by the plaintiffs, the respondents. It does emerge, however, from the case of *Groundsell* v. *Cuthell* [3] and also from the case of *Hill* v. *Luton Corporation* [6] that the court in each case had no doubt that it could in its discretion set aside a generally indorsed writ as being defective (in both these cases the defect was lack of particularity in the indorsement).

The orders and rules which are in my opinion relevant are Order 12 rule 30 and Order 70 rule 1. Order 12 rule 30 provides for application to be made to set aside service of a writ of summons (or, it seems generally accepted, to set aside the writ itself) at the stage in which this case now is. Order 70 rule 1 gives the court a general power to set aside any proceedings as being irregular.

Irregularity consists simply in failing to conform to, to comply with, the rules. The question here is, therefore, does the indorsement on the writ comply with the apposite rules?

Order 2 rule 1 reads as follows:—

"Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the place at which it is intended that the action shall be commenced.".